Supreme Court, U.S.
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No. 94-1066

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

FERRELLGAS, INC. AND GILBERT CANDELARIA,
Petitioners,

v.

ROYCE CLAY AND SHELLA SNIDER,
Respondents.

On Petiton for Writ of Certiorari to the Supreme Court of New Mexico

REPLY MEMORANDUM

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REPLY MEMORANDUM

Ferrellgas, Inc. and Gilbert Candelaria file this reply to respondents' brief in opposition to certiorari.

1. Respondents do not dispute that Question 1 regarding the due process implications of retroactive imposition of punitive damages pursuant to a new standard of liability is important and worthy of this Court's review. Rather, respondents' only argument against certiorari on this question is that the New Mexico Supreme Court "did not adopt or apply any new or unique theory of liability in this case." Opp. at 7. That, however, is plainly and demonstrably incorrect.

The court below held that a corporation could be punished based on the "cumulative negligence" of two of its employees, even though neither employee's conduct constituted the kind of malicious, intentional or reckless conduct required to support punitive damages and, in fact, each employee was merely negligent. In fashioning this new theory and retrospectively applying it to punish Ferrellgas, the court did not cite a single prior New Mexico decision. Instead, it relied exclusively on the Kentucky Supreme Court's decision in *Horton* v. *Union Light, Heat & Power Co.*, 690 S.W.2d 382 (Ky. 1985), which is

apparently the only other decision in the country ever to adopt this theory as a permissible basis for punitive damages. Pet. App. 9a-14a.[1]

Although respondents now cite three New Mexico decisions, Opp. at 10, none of those cases applied a rule even remotely resembling the cumulative negligence theory. Indeed, the main case relied upon by respondents, *Gray* v. *Esslinger*, 130 P.2d 24 (1942), involved an individual, not a corporate defendant, and the only question was whether the individual's high-speed driving constituted "wanton and wilful" conduct that would support punitive damages. *Id.* at 28-29.

Nor did the other two cases cited by respondents, presage the cumulative negligence theory. *Sutherlin* v. *Fenega*, 810 P.2d 353 (N.M. App. 1991), was a malpractice case brought against a single, individual doctor. Similarly, *Dematteo* v. *Simon*, 812 P.2d 361 (N.M. App. 1991), involved the acts of a single employee whose own individual conduct constituted "utter indifference to the rights of others," and thereby subjected him to punitive damages. And both *Sutherlin* and *Dematteo* post-date the conduct at issue in this case, so they could not have provided notice of the

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[1] The court added a "Cf." cite to two libel cases from other jurisdictions, *Warford* v. *Lexington Herald-Leader Co.*, 789 S.W.2d 758 (Ky. 1990) and *Herron* v. *Tribune Publishing Co.*, 736 P.2d 249 (Wash. 1987). But neither decision adopted a cumulative negligence theory and both were rendered *after* the conduct at issue in this case occurred.

cumulative negligence theory to Ferrellgas even if they had, in fact, adopted it.

In short, the New Mexico Supreme Court indisputably adopted and retrospectively applied a new rule of liability in this case to impose punitive damages against Ferrellgas. As this Court recognized last Term, such "[r]etrospective imposition of punitive damages . . . raise[s] a serious constitutional question," *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1505 (1994), and the Court should grant certiorari to address that question in this case.

2. Respondents contend that the Court should not grant review of Question 2 -- whether the Due Process Clause prohibits the imposition of punitive damages for mere negligence -- because Ferrellgas' conduct was reckless, not merely negligent. *See* Opp. at 8-9. But there is no dispute that the sole basis for imposing punitive damages against Ferrellgas in this case was the conduct of Mr. Candelaria and his co-worker Mr. Schell, who were merely negligent. *See, e.g.*, Pet. App. 8a-9a, 14a. Indeed, respondents do not deny, and the record below makes clear, that no Ferrellgas employee engaged in conduct that constituted reckless or intentional behavior sufficient to support an award of punitive damages against Ferrellgas for its limited, preliminary work on the conversion of respondent Shella Snider's automobile to propane.[2]

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[2] Respondents assert that Ferrellgas can be deemed "reckless" because, in addition to the cumulative negligence of its

3. Finally, respondents vaguely complain that, in the New Mexico Court of Appeals -- where Ferrellgas prevailed on state law grounds -- Ferrellgas raised its federal due process challenge to punitive damages "in a minor footnote." Opp. at 5. Ferrellgas' articulation of its due process challenge was, however, sufficient to preserve the issue for purposes of this Court's jurisdiction. *See, e.g., Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 159 n.5 (1980) (question properly preserved when raised in a single reference in the trial court to the "Florida Constitution and its federal counterpart"). Respondents do not contend otherwise.[3]

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employees, it allegedly violated safety and reporting regulations. Opp. at 11. Respondents, however, have been unable throughout the proceedings in this case to point to a single accident -- either before or after Ms. Snider's accident -- resulting from Ferrellgas' conversion of a vehicle to propane fuel. Indeed, Ms. Snider retrieved her car from Ferrellgas before it had completed the conversion and she had no problems at all with the car until four months later -- *after* an amateur auto-mechanic that had no connection to Ferrellgas had dismantled, repainted and reinstalled the propane tank that had been installed by Ferrellgas, and completed the conversion. To impose punitive damages against Ferrellgas based on these facts ignores entirely the concept of blameworthiness that purportedly authorizes state governments to impose these unlimited punishments in the first place.

[3] The New Mexico Supreme Court did not permit briefing and oral argument after it had granted respondents' petitions for review, which did not even raise the cumulative negligence issue. At its first opportunity, on rehearing, Ferrellgas

CONCLUSION

For the foregoing reasons and those set forth in the Petition, this Court should grant certiorari and set this case for plenary consideration.

January 20, 1995

Respectfully submitted,

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exhaustively addressed the due process issues raised by the court's unexpected adoption and retroactive application of the new cumulative negligence rule, thereby properly preserving the issues for review by this Court. *See, e.g., Pruneyard Shopping Center* v. *Robbins*, 447 U.S. 74, 86 n.9 (1979); *Brinkerhoff-Faris Trust Co.* v. *Hill*, 281 U.S. 673, 677-78 (1930). And, although respondents inexplicably assert that Ferrellgas did not raise the due process issue in its post-trial motions, Opp. at 4, Ferrellgas could not have been clearer on this point, explicitly contending in such motions that the "award of punitive damages violates the due process clause of the Fourteenth Amendment to the United States Constitution." Mem. In Support Of Motion For Judgment Notwithstanding The Verdict And New Trial, at 9.